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No. 96-796

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the Petitioner misstate the grounds for the decision by the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari on the issue sought by Petitioner, namely, whether damages for pre-death pain and suffering are legally cognizable, is not ripe for review by this Court, because the Sixth Circuit refused to address that substantive issue, on the grounds of procedural deficiencies in Korean Air Lines' briefing. The questions presented for review to this Court, therefore, are more properly stated as follows:

1. Can this Court pass upon the issue of whether there is a legal right to assert a claim for pre-death pain and suffering under the facts of this case by Writ of Certiorari, when such issue was not passed upon substantively in the lower court?

2. Whether this Court's decision in *Zicherman* v *Korean Air Lines*, 116 S Ct 629 (1996) only addressed wrongful death damages, and did not address the existence of a general maritime law survival action for pre-death pain and suffering, and, if so, whether *Zicherman* did not have the precedential value claimed by Korean Air Lines, leaving the Sixth Circuit free to refuse to address the legal availability of a pre-death pain and suffering claim?

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BRIEF IN OPPOSITION

Respondents are five individuals, representing estates and also appearing individually on their own behalf. Their cases were consolidated, although tried separately, in the Eastern District of Michigan, consolidated by the Sixth Circuit Court of Appeals, and the Petitioner Korean Air Lines' petition for a Writ of Certiorari seeks review of the single opinion which governs all five of their cases.

As such, Respondents Daisy Bickel, Representative for Edna Doris Miller; Dorothy Jones, Representative of the Estate of Joyce Chambers; Richard Bowden, Individually and as Personal Representative of the Estate of Eleanor Beatrice Young Bissell; Willie James, Personal Representative of the Estate of Hazel James; and Michael D. Jones, Personal Representative of the Estate of Margaret Zarif, a/k/a Margaret Jones, respectfully request that this Court deny the Petition of Korean Air Lines for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit in *Bickel v. Korean Air Lines*, 96 F3d 151 (6th Cir 1996).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 15.2, the above identified parties present the following Statement of the Case to address the Petitioner's omissions and to supplement the Statement of the Case presented by Petitioner. Respondents agree with Korean Airlines (KAL), however, that the decedents were killed while passengers on board KAL Flight 007 on September 1, 1983.

A. Proceedings in the Multidistrict Litigation

All of the above parties brought complaints asserting causes of action against Korean Air Lines, including a wrongful death cause of action and, as administrators of the estate of each decedent, a survival cause of action for the decedent's pre-death pain and suffering.

Plaintiffs' actions, all arising out of the KAL 007 disaster, were consolidated for multidistrict litigation before the Federal District Court for the District of Columbia (Honorable Aubrey Robinson, Jr.). In 1988, a jury found that KAL committed wilful misconduct and awarded plaintiffs $50,000,000 in punitive damages. The DC Circuit Court of Appeals overturned the punitive damage award, but upheld the finding of wilful misconduct. All cases were returned to the various transferor courts for damage trials.

B. Proceedings in the District Court

The *Bowden, Chambers, James, Bickel* and *Zarif* actions were consolidated before the District Court for the Eastern District of Michigan, Southern Division, Honorable Anna Diggs Taylor. After the consolidation, KAL filed a series of motions with the ultimate purpose of depriving plaintiffs – representatives of any damages for the wrongful deaths of the decedents caused by KAL's established wilful misconduct. KAL filed motions to strike plaintiffs' jury demands; to deny the legal right to damages for the decedents' pre-death terror, conscious pain and suffering; to deny damages for grief; and to deny loss of society

damages entirely or limit that remedy to dependent beneficiaries. On January 7, 1993, the District Court denied KAL's pre-trial motions to strike jury demands, deny damages, and to limit beneficiaries. Memorandum Opinion and Order, reported in *Bowden v. Korean Air Lines Co, Ltd*, 814 F Supp 592 (ED Mich 1993). The District Court further refused to limit wrongful death and survival claims by exclusive reference to the Death on the High Seas Act [DOHSA], 46 USC App § 761 et seq. *Bowden*, 814 F Supp at 597.

Thereafter, all five damage actions proceeded to trial, singly rather than as a consolidated action. Four of the five cases were tried to a jury. The fifth proceeded as a bench trial. The breakdown of the four jury awards, and the bench trial, follows:

1. *Bickel v. KAL*, Case No. 93-2144, 93-2259

On February 26, 1993, in *Bickel v. KAL*, the jury returned a verdict totaling $1,230,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain, suffering and fear of impending death of Edna Doris Miller – $100,000

(b) Loss of society, love, affection and companionship by:

i. Daisy Bickel – $250,000

ii. Alice Olson – $20,000

iii. Ruby Hoeksema – $20,000

iv. Bertha Griebe – $20,000

v. Robert Young – $20,000

vi. Donald Bickle – $750,000

(c) Grief manifested in physical injury by Daisy Bickel – $50,000

2. *Chambers v. KAL*

On March 12, 1993, the jury returned a verdict totaling $1,500,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Joyce Chambers – $400,000

(b) Loss of society, love, affection and companionship by:

i. Dorothy Jones – $320,000

ii. Jacqueline Chambers – $240,000

iii. James Chambers, Jr. – $180,000

iv. Cornelius Jones – $180,000

v. Gregory Jones – $180,000

3. *Bowden v. KAL*

On May 4, 1993, the jury returned a verdict totaling $2,960,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Eleanor Beatrice Young Bissell – $1,350,000

(b) Loss of society, love, affection and companionship by:

i. Lois Bowden – $625,000

ii. Sonja Johnson – $625,000

iii. Kitty Didtenbir – $50,000

iv. Susan Lewsinkas – $50,000

v. David Johnson – $50,000

vi. Michael Johnson – $50,000

vii. Laura Johnson – $50,000

viii. Karen Johnson – $50,000

ix. Eric Bowden – $50,000

x. Bob Young – $10,000

4. *James v. KAL*

On May 13, 1993, the jury returned a verdict totaling $876,199 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Hazel Jeanne James – $30,000

(b) Past and future pecuniary loss sustained by Willie James – $23,199

(c) Loss of society, love, affection and companionship by:

i. Willie James – $750,000

ii. Cynthia Hogans – $48,000

iii. Cecil Garrett – $5,000

iv. Curtis Garrett – $5,000

v. Katherine Coney – $15,000

[The pecuniary loss sustained by husband Willie James is not at issue on appeal, and is not part of the mandate that has been stayed by the Sixth Circuit].

5. *Zarif* v *KAL*

On October 2, 1993, the District Court, Honorable Anna Diggs Taylor, sitting as factfinder, awarded a total of $1,500,000 in damages to plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Margaret Zarif – $1,000,000

(b) Past loss of society, love, affection and companionship by Michael D. Jones – $500,000

Korean Air Lines made post-trial motions in every case, asking for judgment notwithstanding the verdict, and remittitur, as well as motions to set aside all non-pecuniary damage awards. In each case, the District Court denied Korean Air Lines' motion.

C. The Sixth Circuit Appeal

Korean Air Lines appealed the five cases to the Sixth Circuit. The cases were ordered consolidated on appeal, by Sixth Circuit order dated March 3, 1994. A briefing schedule was entered by the Sixth Circuit, mandating that each side file a "common issues brief", and that each individual, and Korean Air Lines, also file a brief raising issues pertinent to the individual cases only. This briefing was accomplished. All issues that were to be raised were to be raised in either the common issues briefs or the specific case briefs.

As noted above, Korean Air Lines squarely, and at every opportunity, argued in the District Court that DOHSA controlled, and as such, no recovery could be

allowed for pre-death pain and suffering of the decedent. All of the cases cited in footnote 7, at page 4 of Korean Air Lines brief (which Korean Air Lines argues as precluding the continuation, in the Sixth Circuit, of the argument begun in the District Court) were decided prior to Korean Air Lines making such argument in the District Court. The District Court clearly heard Korean Air Lines' arguments, and rejected them. The issue was thus preserved for appeal to the Sixth Circuit.

However, in the Sixth Circuit, Korean Air Lines made the tactical decision to abandon and waive this argument. As conceded by Korean Air Lines in its petition for certiorari, Korean Air Lines' common issues brief did not raise the issue of the application of DOHSA so as to preclude pre-death pain and suffering awards. In the joint plaintiffs' common issues brief, this was noted at page 37, where the plaintiffs stated "KAL now conspicuously omits any argument that non-pecuniary damages for a decedent's pre-death pain and suffering are unavailable under DOHSA in these Warsaw Convention actions." Korean Air Lines, with an opportunity to respond to plaintiffs' point in its reply brief, instead chose to respond that DOHSA and the Warsaw Convention complimented, rather than conflicted with each other, and specifically argued that DOHSA governs only the wrongful death measure of damages, and did not govern the survival cause of action for pre-death pain and suffering. (KAL Common issues reply brief at 6).

Oral argument was had on January 31, 1995. At that oral argument, which was extended by agreement of the parties and of the court to 45 minutes a side, Korean Air Lines did not argue that pre-death pain and suffering

damages were barred by DOHSA in these cases. The only arguments on these points were challenges to the evidence on which the award of such damages were based, and the amount of the damages awarded.

About a year later, with no decision having yet come out, this court issued its opinion in *Zicherman v. Korean Air Lines*, 116 S Ct 629 (1996). By order dated January 26, 1996, both sides were ordered to file a supplemental brief, on the issue of the effect of *Zicherman* on the consolidated cases in the Sixth Circuit. Korean Air Lines took the opportunity to raise, for the first time in the Sixth Circuit proceedings, the issue of whether the Death on the High Seas Act precludes the recovery of all non-pecuniary damages, including pre-death pain and suffering damages. The consolidated plaintiffs argued that Korean Air Lines had waived the argument, by not raising it sooner, and also argued that *Zicherman* did not preclude the award of pre-death pain and suffering damages – in fact, *Zicherman* had not even considered the issue. *Zicherman*, 636, note 4.

The Sixth Circuit first upheld defendant's argument, and ruled, in a published opinion, that plaintiffs' non-pecuniary damages, including pre-death pain and suffering of the decedents, was barred by the Death on the High Seas Act. *Bickel v. Korean Air Lines*, 83 F3d 127 (6th Cir 1996). In response, plaintiff moved for rehearing, or in the alternative, for rehearing en banc, raising as one of its arguments that Korean Air Lines had waived the issue of the application of DOHSA to preclude pre-death pain and suffering damages by failing to raise it in any of its opening briefs or at oral argument. The Sixth Circuit, in

lieu of granting plaintiff's motion for rehearing, withdrew those sections of the *Bickel* opinion dealing with the applicability of DOHSA to plaintiffs' damages for the decedents' pre-death pain and suffering, and replaced them with an opinion holding that Korean Air Lines had indeed waived the issue by failing to raise it in its opening briefs to the court. *Bickel v. Korean Air Lines*, 96 F3d 151 (6th Cir 1996). The court, relying upon Sixth Circuit precedent, *Priddy v. Edelman*, 883 F2d 438, 446 (6th Cir 1989), ruled that Korean Air Lines was aware of the issue (see footnote 2, noting that Korean Air Lines presented the District Court with the argument it claims was only available after *Zicherman* to the Sixth Circuit) and yet deliberately did not make the argument.

> "Any argument that Korean Air Lines could make based on the fact that DOHSA does not allow non-pecuniary damages was available to it before the court decided *Zicherman*, and therefore KAL could have raised this issue in its opening briefs. . . . Because KAL initially failed to challenge the propriety of awarding damages for pre-death pain and suffering, and because *Zicherman* does not alter the state of law on the availability of such awards, we decline to address this belatedly raised issue." *Id* at 153-54.

Korean Air Lines then moved for rehearing, or in the alternative, rehearing en banc, to the Sixth Circuit, which was denied by Order dated October 10, 1996. Korean Air Lines now seeks certiorari to this Court. For the reasons set out in the following brief, this Honorable Court should not grant certiorari.

REASONS FOR DENYING THE PETITION

I. THE COURT BELOW REFUSED TO ADDRESS THE SUBSTANTIVE ISSUE PRESENTED BY KOREAN AIR LINES, SO IT CANNOT BE RAISED FOR THE FIRST TIME IN THE PETITION FOR WRIT OF CERTIORARI.

At the time of the Korean Air Lines Petition for Writ of Certiorari, two other cases were pending in this court: *Korean Air Lines v. Forman,* No. 96-530 and *Saavedra v. Korean Air Lines,* No. 96-623. Both of these cases had certiorari denied by decision of 12-9-96. Accordingly, this case is now the only one pending in this Court arising out of the KAL 007 disaster. Thus, unless this Court determines, for the first time, that the Sixth Circuit had no right to apply its own internal, procedural law as to when a party waives and/or abandons an issue, it cannot reach the issues raised by Korean Air Lines in its Petition for Writ of Certiorari. Because the Sixth Circuit was correct, and Korean Air Lines had previously made the argument that DOHSA precludes recovery of damages for pre-death pain and suffering in a survival action in the District Court, and then did not raise it, but instead, tactically waived it in its initial briefs and oral argument to the Sixth Circuit, the Sixth Circuit's decision should not be disturbed, and the Korean Air Lines writ should be denied.

Korean Air Lines has at all times been aware of the distinction between wrongful death damages and survival action damages in this litigation. As previously pointed out, it consistently argued in the District Court

that non-pecuniary damages for pain and suffering, specifically including pre-death pain and suffering of the decedent, should not be awardable under DOHSA. On appeal to the Sixth Circuit, it clearly made a tactical decision. It did not address the legal availability of survival action damages in the opening briefs of the appeal. Indeed, responding to plaintiffs' argument that the Warsaw Convention should be read apart from DOHSA, because they were in conflict as to the issue of survival action damages, defendant spent two pages of its common issues reply brief harmonizing the two, specifically citing with approval the cases allowing decedents' pre-death pain and suffering in aviation disasters.

Thus, Korean Air Lines made a tactical decision to withdraw the issue of DOHSA preclusion of pre-death pain and suffering damages, for legal advantages deemed substantial by it. Only after the *Zicherman* decision did Korean Air Lines, having already briefed and orally argued the issue, make a U-turn, and begin arguing that *Zicherman* served to revive the issue it had previously waived and abandoned. The Sixth Circuit, in its final word on the subject, found this argument easy to refute, and did so.

This Court does not normally hear an issue that has not been raised or resolved in the lower court. *Youakim v. Miller*, 425 US 231, 234 (1976); *Lytle v. Household Manufacturing, Inc*, 494 US 545 (1990); *Illinois v. Gates*, 462 US 213, 218-19 (1993) (referring to appeals from state courts), and there is no compelling reason to do so in this case.

The Sixth Circuit's logic cannot be improved upon, and so is therefore included in its entirety:

"KAL argues that we should not apply this rule to the instant appeal, however, contending that after it filed its opening briefs, the Supreme Court's decision in *Zicherman* intervened and changed the law on the availability of pre-death pain and suffering damages. This contention is incorrect. As noted above, *Zicherman* does not address the propriety of the pre-death pain and suffering damages awarded at trial in that case, and that award stands to this day. See *Zicherman*, 116 S Ct at 636, n 4 (noting that KAL did not challenge the validity of the pre-death pain and suffering award in its petition for certiorari).

Moreover, in stating that DOHSA disallows recovery of non-pecuniary loss of society damages, the *Zicherman* court merely followed settled law. The court decided that question almost 20 years ago in *Mobil Oil Corp v. Higginbotham*, 436 US 618, 625 (1975). The *Zicherman* opinion therefore neither added to, nor made any changes in, the law regarding the availability of non-pecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact that DOHSA does not allow non-pecuniary damages was available to it *before* the court decided *Zicherman*, and therefore KAL could have raised this issue in its opening briefs." *Bickel* at 153-54.

Korean Air Lines made it a point to raise and preserve the issue that DOHSA precluded pre-death pain and suffering awards on behalf of decedents in aviation disasters over water in the District Court. *Bickel* at fn 2. With full opportunity to preserve this issue in the Sixth Circuit, it tactically declined to do so. The Sixth Circuit

was proper in ruling that this tactical decision precluded the last-minute interposition of the argument, and held it properly to be waived. This Court should not permit it a second chance, in a matter of some substantive importance, where there is no substantive analysis of the issue in the court below for this court to consider.

II. *ZICHERMAN* DID NOT ADDRESS THE SURVIVAL CAUSE OF ACTION OR PRE-DEATH PAIN AND SUFFERING DAMAGES TO THE DECEDENT, SO THE COURT BELOW WAS NOT REQUIRED TO APPLY ANY PRECEDENTIAL VALUE TO *ZICHERMAN* ON THIS ISSUE.

Korean Air Lines also argues that the Sixth Circuit's decision is erroneous, based upon this Court's decision in *Zicherman*, and argues that the *Zicherman* rationale should be applied retroactively to pending cases, so as to eliminate the plaintiffs' verdicts for pre-death pain and suffering damages. Korean Air Lines, as pointed out by the Sixth Circuit, does not read *Zicherman* correctly.

In *Zicherman*, this Court held that the Warsaw Convention acts as "nothing more than a pass-through, authorizing [the courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S Ct at 636. *Zicherman* only addressed the wrongful death cause of action and measure of damages for deaths that occur on the high seas. If one follows the "pass-through" procedure as it relates to a survival action for pre-death pain and suffering of the decedent, a court is to apply the general maritime law regarding survival actions for pre-death pain and suffering, which would sustain the jury's verdict. This Court has several times implied, without

deciding, that there exists a general maritime law survival cause of action for pre-death pain and suffering. See, *Miles v. Apex Marine Corp*, 498 US 19, 34 (1990), (noting that several Courts of Appeal have identified a general maritime survival cause of action for pre-death pain and suffering); *Sea-Land Services Inc v. Gaudet*, 414 US 573, 575-76, note 2 (1974) (noting the distinction between the wrongful death remedies and survival action remedies); *Yamaha Motor Corp v. Calhoun*, 116 S Ct 619, 625, n 7 (1996) (assuming, without deciding, that *Moragne v. State Marine Lines*, 398 US 375 (1970) encompasses a general maritime survival cause of action).

Several lower courts have also specifically found a general maritime law survival cause of action for pre-death pain and suffering, and have further held that such an action is not precluded by the wrongful death action permitted under DOHSA. *Barbe v. Drummond*, 507 F2d 794, 799-800 (1st Cir 1974); *Azzopardi v. Ocean Drilling & Exploration Company*, 742 F2d 890, 893 (5th Cir 1984); *Law v. Sea Drilling Corp*, 523 F2d 793, 794-95 (5th Cir 1975); *Gray v. Lockheed Aeronautical Systems Co*, 880 F Supp 1559, 1569 (ND Ga 1995); *Rye v. United States Steel Mining Co*, 856 F Supp 274, 279 (ED Va 1994); *Chute v. United States*, 466 F Supp 61, 69 (D Mass 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd*, 573 F Supp 1277, 1285 (WD Pa 1983); *Favoloro v. S/S Goldengate*, 687 F Supp 475, 479 (ND Cal 1987). But see, *Saavedra v. Korean Air Lines*, 93 F3d 547, 550-554 (9th Cir 1996), certiorari denied 12-9-96, No. 96-623. Thus, this Court's direction in *Zicherman* that a pass-through occur, would allow the general maritime

law, which permits a survival action remedy, to compliment the DOHSA remedy of wrongful death. Nothing in the *Zicherman* decision contradicts this result.

KAL argues that "*Zicherman* . . . *obligated* the court below to address the question of whether non-pecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in these cases." (Petition at 13). In this regard, KAL seriously misstates the *Zicherman* holding. The *Zicherman* holding only requires courts to apply DOHSA to wrongful death remedies. In fact, Korean Air Lines itself argued, in the Sixth Circuit, that DOHSA does not preclude the awarding of survival action damages in the form of damages for pre-death pain and suffering under the Warsaw Convention. Because *Zicherman* itself does not address the survival action damages, the Court below was not obligated to accord it precedential effect. Arguably, even if *Zicherman* did establish a precedent, because the defendant waived and abandoned its issue regarding pre-death pain and suffering damages, the Sixth Circuit was within its rights to decline to address this issue in any event.

Furthermore, the decision of the court below is not, as KAL asserts, in direct conflict with the erroneous decision from the Ninth Circuit in *Saavedra, supra*. In *Saavedra*, the Ninth Circuit addressed the substantive issue of the legal availability of the survival cause of action and, improperly ignoring the distinction between survival remedies and wrongful death remedies, held that the damages for pre-death pain and suffering were not recoverable. In part, the Ninth Circuit relied on the withdrawn first opinion of the Sixth Circuit in *Bickel*. The Ninth Circuit's analysis failed to take into account any of the

substantive differences between survival actions, which are passed through the Warsaw Convention by general maritime law, and wrongful death actions, which are passed through the Warsaw Convention by DOHSA. More importantly, however, there is no conflict between the circuits because the Sixth Circuit did not base its decision on substantive grounds. As pointed out in a study of federal circuit court conflicts, Helman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U Pitt L Rev 693 (1995), scholars have debated for more than half a century the question of what is an intercircuit conflict. *Id* at 707. Probably the best answer was set out in Estreicher and Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 NYU L Rev 681, 722 (1984) as follows:

> "A conflict, for present purposes, occurs when two or more courts – take contrary positions on the same legal issue. We term this a 'square' conflict. A conflict presses for Supreme Court review only when courts in a given jurisdiction – federal circuit or state – are bound to follow a legal rule contrary to the rule that must be followed in another jurisdiction. . . . Nor does a square conflict exist when a federal court of appeals or a state supreme court has stated its opposition to another court on a question of federal law dicta or as part of an alternative holding."

Under this definition, there is no conflict between *Saavedra* and *Bickel*. Were the issue to arise again in the Sixth Circuit, the lower federal district court for the Eastern District of Michigan, and indeed, the Sixth Circuit itself, could choose to follow *Saavedra*, or at that point,

could choose, for the first time, to issue a holding squarely conflicting with the issue decided by the Ninth Circuit in *Saavedra*.

However, *Bickel* did not do so. Instead, relying upon Sixth Circuit precedent and sound jurisprudential reasoning, the Sixth Circuit, in the amended *Bickel* decision, ruled that the petitioner herein, by its own statements and actions, had tactically chosen to waive or abandon the issue now sought to be presented to this Honorable Court by writ of certiorari. Therefore, under no circumstances is there a conflict between the Ninth and Sixth Circuits on the issue of whether DOHSA precludes the awarding of pre-death pain and suffering damages in a survival action.

As this Court is aware, the KAL 007 disaster occurred in 1983. The families involved have been through more than 13 years of torturous litigation. The issue of whether a general maritime law survival cause of action for pre-death pain and suffering passes through the Warsaw Convention in the way that *Zicherman* determined that DOHSA wrongful death cause of action does is undeniably an issue of some moment, and may be an issue that eventually will have to be faced by this Court. However, for all the reasons set forth above, this case is not the proper vehicle for such a holding. Even if this Court were to hold that no pre-death pain and suffering damages are available in a Warsaw Convention action, such would not apply to this case, because defendant had voluntarily waived and abandoned the issue in the Sixth Circuit. Nothing in *Zicherman* decides the issue; and Korean Air

Lines is incorrect in stating that by the fortuitous interposition of the *Zicherman* opinion, it revitalizes the claims that it had voluntarily waived in the Sixth Circuit below.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the petition.

Dated:

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